No. 13

In the Supreme Court of the United States

OCTOBER TERM, 1950

JOSEPH EDWARD MORISSETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court overruling petitioner's motion for a new trial (Pet. 21-23) is not reported. The majority and dissenting opinions in the Court of Appeals (R. 64-93) are reported at 182 F. 2d 427.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1951 (R. 63). The petition for a writ of certiorari was filed on March 6, 1951. The jurisdiction of this Court is invoked under

28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether a felonious intent is an element of the offense of knowingly converting government property.

2. Whether there was evidence that the government property in question had been abandoned so as to require the submission of that question to the jury.

3. Whether the jury should have been instructed to acquit petitioner if they accepted his contention that he believed the property had been abandoned.

STATUTE INVOLVED

18 U.S.C. (1948) 641 provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not ex-

ceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

STATEMENT

The indictment under which petitioner was convicted charged that on or about December 2, 1948, he "did unlawfully, wilfully and knowingly steal and convert to his own use about three tons of used bomb casings having a value of approximately $84.00, and being the property of the United States of America, located at the bombing range of the Oscoda Army Air Base, in violation of Section 641, United States Code, Title 18" (R. 3-4). The evidence adduced at the trial may be summarized as follows:

The United States had leased from the Conservation Department and Department of Agriculture of the State of Michigan for use as a practice bombing range on the Oscoda Air Base (R. 10, 13-14), land on which there were a number of "danger" signs (R. 9, 13, 16, 17, 19, 21, 22, 23). The sign at the entrance to the bombing area read, "Danger, Keep Out, Bomber Range" (R. 9), and other signs warned, "United States Government Property—Stay Off" (R. 19). The practice bomb used consisted of a bomb casing about 3½ feet long, 8 inches in diameter, and 16 pounds in weight,

which was filled with 100 pounds of sand and a three-pound charge of black powder (R. 9). After practice bombing, the old casings, some of which would be dangerous if the black powder had not exploded, were cleared from the area and stacked in piles at the edge of the range (R. 9, 10). This particular type of casing had been used at least as far back as 1944. Many of the stacked casings were rusted and decomposed from exposure to the weather, and had holes in them from explosions. (R. 15, 16, 38.)

Petitioner operated a fruit business during the summer and worked as a junk dealer during the winter (R. 30, 34). On November 22 or 23, 1948, he and his brother-in-law, one Atchison, were hunting deer without success on the Oscoda Army Air Base. During daylight hours, they piled about three tons of used bomb casings on petitioner's truck and took them in two trips to the farm of Atchison's uncle about 20 miles away. During the loading, they talked to some other hunters who came by. (R. 20, 24-25, 31-32.) At the farm, a tractor was used to flatten the casings so that petitioner could carry more of them on his truck (R. 21, 25, 32).

Petitioner admitted that by reason of his deer hunting on the air base for about the preceding three years he was familiar with the signs around the bombing range and knew that it belonged to the United States Government (R. 34). He also

admitted that he did not have permission to take the casings (R. 35). The commanding officer of the air base testified that on and before December 1, 1948, he did not have authority to dispose of the used casings (R. 9), and that petitioner did not at any time ask his permission to take them (R. 16).

On or about December 2, 1948, at about 1:30 or 2:00 p.m. petitioner loaded the bomb casings on his truck and started from the farm toward Flint, Michigan, for the purpose of selling them (R. 20, 25, 37). John Wagner, upon seeing the bomb casings on the truck, stopped petitioner at a road junction and, according to his testimony, he "told [petitioner] he was taking a chance, advised him to take [the bomb casings] back where he got them" (R. 19). Petitioner denied that he had such a conversation with Wagner, and asserted that the latter merely stated "he had some scrap over to his place he wanted to sell" (R. 32-33). Leo May, a worker in a scrap drive for the Chamber of Commerce and Agriculture of Oscoda, also saw petitioner at the road junction and "wondered why anybody else could get [bomb casings] when we couldn't get them for our scrap drive" (R. 7). Arriving at Flint with his load, petitioner sold the three tons of casings at $28.00 per ton, or a total of $84.00, to the Laro Coal and Iron Company (R. 22, 25, 28, 33).

The day after Leo May told his father about seeing petitioner's truck with the bomb casings on

the highway, the elder May, an employee at the Oscoda Air Base, related this incident to the commanding officer of the base, who in turn notified the State Police and the C.I.D. Section at Selfridge Field, of which Oscoda was a sub-base (R. 7, 9, 16). On December 10, 1948, when a State policeman stopped petitioner on the highway and inquired if he had taken some bomb casings from the air base, petitioner admitted that he had done so without permission and had sold three tons of the casings at $28.00 per ton (R. 22). On January 20, 1949, after learning that a Federal Bureau of Investigation agent desired to talk to him, petitioner went to the F.B.I. office in Flint and made and signed a statement, which was introduced in evidence without objection. In this statement, petitioner admitted the sale of three tons of bomb casings for a total of about $85.00, and said: "* * * We did not get any deer so we decided to make our hunting trip pay by loading up my 2 ton, 1948 red Studebaker with the bomb casings. * * * I knew the bomb casings were at one time U.S. Government property but I did not know if they were when I took them. I did not know these bomb casings were not to be removed from where they were." (R. 23-25.)

The following requested instruction, which the trial court refused to give, shows the theory of petitioner's defense (R. 54):

> 1. The defendant took the property and sold it. There is no question about that.

> The question is: What was in Mr. Morissette's mind at the time he took it? Unless you find beyond a reasonable doubt that at the time defendant took the property he had a felonious intent, knowledge that his act was wrong, he is not guilty.
>
> Therefore, if Mr. Morissette believed the government had thrown away or abandoned this property, you will find him not guilty, even if he was mistaken in his belief.

Before the court gave its charge, this colloquy occurred (R. 48):

> Mr. TRANSUE [petitioner's counsel]: Our theory of this is that if [petitioner], when he picked these things up, thought nobody wanted them, it would be like junk that would be alongside the road. It is the state of his mind at the time. You have to have a state of mind to be a thief.
>
> The COURT: The state of his mind was to take something that didn't belong to him, and there is the intent. If I am wrong, I am wrong. Bring in the jury.
>
> I will not permit you to show this man thought it was abandoned. If that is the law I want a higher court than I am to say so.
>
> * * * * *
>
> I don't think anybody can have the defense they thought the property was abandoned on another man's piece of property.

In its charge, the court, after reciting the facts that petitioner said he thought the casings were

abandoned, that he knew they did not belong to him, and that he sold three tons of them, continued:

> Now, [petitioner] admits that. The defense that they sought to introduce here was that he thought it was abandoned property. And I instruct you that there are some instances where a person can take property that appears to be abandoned, and take it and really be guilty of no criminal offense. And this court permitted all the testimony to go in. But when it comes to the time of instructing the jury, I must instruct you that in this case there is no evidence of abandoned property. Abandoned means absolute relinquishment, including both the intent to abandon, and the external act by which intention is carried into effect.
>
> And when the evidence is such as to raise the issue, abandonment is a question for the jury. But ladies and gentlemen, I hold in this case that there is no question of abandoned property. * * *
>
> In every crime there must be an intent to do the thing that the person does. * * * the question is here, Did he intend to take the property? And I instruct you that if you believe the testimony of the government in this case, he intended to take it. And I further instruct you that if you believe his testimony, he intended to take it. [R. 51.].

* * * * *

I don't think that this calls for any extended further instruction to this jury. You have taken an oath to follow the law as given by this

court. Ordinarily there is a question of fact for the jury. I don't think there is any question of fact for the jury, except whether you believe one story or the other. You can go up there and come down and say not guilty. You can do that because you are the judges of the facts. But if you follow the instruction of the court, you have got to believe one story or the other, or it is up to you to believe one story or the other. And I instruct you to this effect: That if this young man took this property (and he says he did), without any permission (he says he did), that was on the property of the United States Government (he says it was), that it was of the value of one cent or more (and evidently it was), that he is guilty of the offense charged here. If you believe the government, he is guilty. [R. 52-53.]

Petitioner's counsel excepted to the charge and the following colloquy ensued (R. 53-54):

The COURT: Your exception is I should submit to the jury the question of abandonment?

Mr. TRANSUE: Not only the question of abandonment, but also the condition of his mind and the intent that he had at the time that this was removed; that there must have been a felonious intent in his mind to take it away and not be just a trespass.

The COURT: Well, all right. The question on intent is whether or not he intended to take the property. He says he did. Therefore, if you believe either side, he is guilty.

You may make any other objection on the record.

* * * * * *

Mr. TRANSUE: The objection is this, as I understand the court's charge, that the taking is the intent.

The COURT: No. I leave the question to them whether he intended to take it. He says he did.

Mr. TRANSUE: But the taking must have been with a felonious intent.

The COURT: That is presumed by his own act.

Mr. TRANSUE: That is my exception.

The COURT: All right.

Mr. TRANSUE: That the felonious taking cannot be derived just from the taking.

The COURT: All right, overruled.

The jury having found petitioner guilty, the court sentenced him to two months' imprisonment, or to pay a fine of $200.00, together with costs (R. 55-57). The court denied petitioner's motion for a new trial (R. 59), and on appeal, the Court of Appeals affirmed, one judge dissenting (R. 63).

ARGUMENT

1. Petitioner contends, relying upon the dissenting opinion below, that as a prerequisite for conviction under 18 U.S.C. 641 (*supra*, pp. 2-3) there must have been "a felonious intent in his mind at the time he took the bomb cases and converted them

to his own use" (Pet. 10-18). To the contrary, we believe that the words "knowingly converts" in the statute clearly require only a deliberate conversion of government property to the taker's own use, and that no further element of intent is necessary to complete the offense. In advancing this argument, petitioner attempts to show that under Sections 82, 87, 100, and 101 of 18 U.S.C., 1940 ed., which were consolidated, according to the reviser's notes,[1] into the present 18 U.S.C. 641, felonious intent was an ingredient of each of the crimes proscribed. But 18 U.S.C. 641 is different from the former Sections 82, 87, 100 and 101[2]; whereas Sections 82 and 101 each mentioned a specific intent, 18 U.S.C. 641 does not expressly prescribe any intent as an element of the crimes defined in the first paragraph (the only part pertinent here), although it does require an "intent to convert" as an element of the crimes of receiving and concealment defined in the second paragraph. It would seem that Congress would have written into the new Section 641 an unequivocal requirement of felonious intent if it had thought this should be required as a condition for a conviction under the

[1] Title 18, United States Code, Congressional Service (1948), pp. 2505-2506.

[2] In 18 U.S.C., 1940 ed., Section 82 read: "* * * take and carry away or take for his use, or for the use of another, with intent to steal or purloin * * *"; Section 87: "* * * steal, embezzle, or knowingly apply to his own use * * *"; Section 100: "* * * embezzle, steal, or purloin * * *"; Section 101: "* * * receive, conceal, or aid in concealing, or shall have or retain in his possession with intent to convert to his own use or gain * * *."

first paragraph, especially in view of the fact that it had prescribed a specific intent in two of the old sections and also in the second paragraph of the new Section 641. Petitioner sought to have the courts below read into the first paragraph of 18 U.S.C. 641 a provision which is not there, i.e., one requiring felonious intent. But the wording of the statute being plain, the courts had "no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision" (*United States* v. *Temple,* 105 U.S. 97, 99); they could not "interpolate a qualification which the statute does not contain" (*Ransom* v. *Williams,* 2 Wall. 313, 318).

As the majority below properly held, citing *Adolfson* v. *United States,* 159 F. 2d 883 (C.A. 9), certiorari denied, 331 U.S. 818, by reason of the disjunctive "or" before the clause "knowingly converts to his own use or the use of another" in section 641, the statute "is not limited in coverage to embezzling, stealing and purloining government property, but also includes the knowing conversion of such property by anyone to his own use" (R. 67). Even the word "steal" has "no common law definition to restrict its meaning as an offense, [and] is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership * * *." *Crabb* v. *Zerbst,* 99 F. 2d 562, 565 (C.A.

5); see also *United States* v. *Handler*, 142 F. 2d 351, 353 (C.A. 2), certiorari denied, 323 U.S. 741. But if the offenses of stealing and embezzling implicitly require a felonious intent as an ingredient, the statute is clear in requiring only that a conversion of government property be committed "knowingly"; and "knowingly" does not necessarily mean absolute knowledge or a specific intent. *United States* v. *Weisman*, 83 F. 2d 470, 474 (C.A. 2), certiorari denied, 299 U.S. 560. It is highly significant that the immediately following words in the same statute make it a crime, without regard to intent, to sell, convey or dispose of government property "without authority". The clear purpose of these provisions, like the provision here involved, is to penalize all deliberate interference with government property, without regard to the existence of any particular criminal intent.

As used in federal criminal statutes even the word "wilfully," a more restrictive term than "knowingly," has been held in some contexts to mean no more than that a person charged with a duty knows what he is doing, and not that he must suppose that he is breaking the law. *Fields* v. *United States*, 164 F. 2d 97, 100 (C.A. D.C.), certiorari denied, 332 U.S. 851; *Dennis* v. *United States*, 171 F. 2d 986, 990 (C.A. D.C.), affirmed 339 U.S. 162.

A person "is presumed to intend the necessary and legitimate consequences of what he knowingly

does." *Reynolds* v. *United States*, 98 U.S. 145, 167; *Dunlap* v. *United States*, 70 F. 2d 35, 37 (C.A. 7), certiorari denied, 292 U.S. 653. And it is no defense to a wrongful act knowingly and intentionally committed that it was done without a criminal intent. *Gates* v. *United States*, 122 F. 2d 571, 575 (C.A. 10), certiorari denied, 314 U.S. 698; see also *Waller* v. *United States*, 177 F. 2d 171, 175 (C.A. 9).

Petitioner admitted that he knew the bombing range from which he took the bomb casings belonged to the United States Government and that he did not have permission to take them. The fact that his actions occurred during daylight without attempt at concealment did not exculpate him. It is clear that he intended to take property which was not his and he knowingly converted it by sale for his own profit. His admitted acts knowingly performed compelled his conviction under 18 U.S.C. 641, regardless of his subjective intent as to whether he was committing a criminal offense. As the majority below held, "The conversion to his use and the selling of the bomb casings without authority were, as appears from the record, knowingly done by the [petitioner]." (R. 66.)[3]

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[3] Petitioner asserts a conflict (Pet. 11-12, 16) between the decision below and *Adolfson* v. *United States*, 159 F. 2d 883 (C.A. 9), certiorari denied, 331 U.S. 818. *Adolfson* did not involve an interpretation of 18 U.S.C. 641, which had not yet been enacted, and, furthermore, the prosecution there, under 18 U.S.C. (1940 ed.) 87, was against a person who bought property from another who had stolen it from the

2. Petitioner apparently contends, again in reliance upon the dissenting opinion below, that the issue as to whether the property had been abandoned by the Government should have been submitted to the jury (Pet. 10, 18).

As the trial court correctly stated the law in its charge, abandonment includes "both the intent to abandon,[4] and the external act by which the intention is carried into effect" (R. 51).[5] And while "abandonment is ordinarily a question of fact, to be determined by the circumstances and the intention of the party against whom the plea is asserted, * * * where there is and can be no dispute about the facts, it then becomes a question of law." *Kister Oil Development Corp.* v. *Young*, 27 F. 2d 433, 437 (W.D. Ky.).

There was no dispute here about the facts as to the alleged abandonment. True, some of the bomb casings were rusted and decomposed, and petitioner made the self-serving statement that he "thought

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Government, and the issue was as to his guilty knowledge of the theft. Neither is there conflict (see Pet. 16) with *Crabb* v. *Zerbst*, 99 F. 2d 562 (C.A. 5), also decided before the enactment of 18 U.S.C. 641. That case involved a conviction under Section 46 of the Criminal Code (then 18 U.S.C. 99), which used the express language, "feloniously take and carry away," so that there was no question, as here, of reading such a requirement into the statute.

[4] *Baglin* v. *Cusenier Co.*, 221 U.S. 580, 597-598; *Carter Oil Company* v. *Mitchell*, 100 F. 2d 945, 951-952 (C.A. 10); *International Finance Corp.* v. *Jawish*, 71 F. 2d 985, 986 (C.A.D.C.).

[5] *Helvering* v. *Jones*, 120 F. 2d 828, 831 (C.A. 8); certiorari denied, 314 U.S. 661; *Weakley* v. *Johnson*, 294 Fed. 258, 260 (C.A. 5); *Log-Owners' Booming Co.* v. *Hubbell*, 135 Mich. 65, 69; *Hediger* v. *Zastrow*, 174 Minn. 11, 12.

[they] had been abandoned" (R. 37-38). However, as the majority below pointed out, "No proof was adduced by the [petitioner] to the effect that the property had actually been abandoned" (R. 70). Such evidence as there was on this matter showed the contrary. The casings had been stacked in piles (R. 9, 10) and had not been scattered about haphazardly, which would seem to indicate that the Government would some day ship and sell them for salvage (cf. R. 52). If petitioner could find a buyer for them, as he did, it is a reasonable assumption that the Government also could do so. A further indication that the Government had no intention of abandoning the casings was the fact that they had been kept on its own property and had not been moved to other property or to a common junk pile. The commanding officer of the air base testified that he did not have authority to dispose of the bomb casings (R. 9), and that petitioner did not at any time ask his permission to take them (R. 16). Neither did petitioner claim that he had any permission to take the casings, which he knew did not belong to him (R. 30), or that he made any attempt to contact the Army authorities at the base to ascertain whether the property had actually been abandoned so that he could legally remove it. Nor did he claim that operations at the base had been discontinued; on the contrary, he was familiar with

the signs around the bombing range and knew that it belonged to the Government (R. 34). In these circumstances, we think the majority below correctly sustained (R. 69-70) the trial judge's action in refusing to allow the jury to speculate on this matter and in instructing them as a matter of law that "in this case these is no evidence of abandoned property" (R. 51). Cf. *Worsham* v. *State*, 56 Tex. Crim. 253, 260.

3. By the same token, the trial judge was justified in refusing petitioner's requested instruction that if he believed, even though mistakenly, that the casings had been abandoned, the jury should find him not guilty (see pp. 6-7, *supra*). The evidence as to the stacking of the casings on plainly marked government land and the warning given petitioner by the witness Wagner (*supra*, p. 5) plainly showed that petitioner could not possibly have entertained a *bona fide* belief that the casings had been abandoned, especially when it is considered that a simple inquiry of the proper authorities would have determined whether he had any right to take them. It is not error to refuse to submit a sham issue to a jury; there must be evidence which will rationally support a finding in favor of the party having the affirmative. *Battle* v. *United States*, 209 U.S. 36; *Passantino* v. *United States*, 32 F. 2d 116 (C.A. 8); *Shaw* v. *United States*, 151 F. 2d 967 (C.A. 6). In the face

of the evidence that the casings had not been abandoned and the lack of any evidence to the contrary, petitioner was not entitled to have the jury speculate that he may have thought he had a right to help himself to the property.[6]

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[6] Petitioner asserts, in the form of a "question presented," but without supporting argument, that the trial judge's charge amounted to a direction of a verdict of guilty or was at least "argumentative and biased" (Pet. 6). The issues at the trial conterned only the requisite intent under the statute and petitioner's assertion that he thought the casings had been abandoned. In view of the judge's correct resolution of these issues, he was quite right in his comments that there was no dispute that petitioner took the casings from government land without permission and that the question as to petitioner's state of mind was whether he intended to take the property. The judge did indicate that under his view as to the proper interpretation of the statute, the evidence on both sides pointed to guilt (*supra*, p. 9). He was unquestionably right in his summary of the evidence and it was not error for him to tell the jury that if they believed the testimony offered by the government petitioner was guilty as a matter of law. But the judge did not invade the jury's province, for, along with the standard instructions as to the presumption of innocence and the Government's burden of proof (R. 49-50), he made it clear to the jury that they were "the judges of the facts," that it was for them to say whether they believed "one story or the other," and that they were free to bring in a verdict of not guilty (R. 52). In any event, to borrow the language of the majority of the Court of Appeals, "As we have interpreted the statute, appellant was guilty of its violation beyond a shadow of doubt, as evidenced even by his own admissions. To reverse and remand for a new trial because of the expressions of the district judge in his charge would be to ignore the spirit as well as the letter of Rule 52(a) of the Federal Rules of Criminal Procedure respecting harmless error. * * *" (R. 70.)

CONCLUSION

The case involves no conflict or question of general importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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